

Written Testimony
by

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before the

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and Hazardous Materials

addressing

“Reauthorization of the Federal Pipeline Safety Program”

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Madam Chairman, Ranking Member Shuster, and members of the subcommittee, my name is Dan East, Regional Manager for Reynolds, Inc., in Albuquerque, New Mexico. I also serve as Chairman of the National Utility Contractors Association. NUCA represents thousands of underground utility contractors, manufacturers, and suppliers who provide the materials and workforce to build and maintain our nation's network of water, sewer, gas, telecommunications, and construction site development industries. NUCA appreciates the opportunity to appear before you to discuss the today to discuss the implantation of the Pipeline, Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006 and this year's reauthorization of the federal pipeline safety program.

In December of 2009, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a Advanced Notice of Proposed Rulemaking (ANPRM) on the Pipeline and Hazardous Materials Safety Administration's (PHMSA) initiative to establish criteria for determining adequate enforcement of state pipeline damage prevention laws.

The addresses enforcement of inadequate state pipeline damage prevention laws by authorizing federal dollars to improve the quality and effectiveness of state programs, and by authorizing expanded federal enforcement authority. Specifically, the ANPRM states that the PIPES Act provides PHMSA with "authority to conduct civil enforcement proceedings against excavators who damage pipelines in a state that has failed to adequately enforce its damage prevention laws."

General Comments

NUCA is grateful to have participated on a task team to review annual state damage prevention grant applications for these federal dollars since the PIPES Act was enacted. Providing additional federal resources to improve state damage prevention programs, and enforcement of them, is an effective and proactive way to assist states to provide a safer work environment and enhance damage prevention of underground facilities.

Establishing a federal role in enforcement of damage prevention laws is another matter entirely. NUCA agrees with many of the stakeholders in the damage prevention community that enforcement of damage prevention laws is entirely inadequate in many states. However, often overlooked in the debate is that enforcement of *all* parties responsible for preventing damage is often inadequate, not just enforcement of excavation requirements. Damage prevention is a two-way street – the responsibilities of those locating and marking underground facilities are equally important as those performing excavation activities. Consistent with the enforcement provisions in the PIPES Act, PHMSA's final rulemaking should ensure for a balanced approach to damage prevention enforcement.

Additionally, any damage prevention organization worth its salt recognizes the importance of "shared responsibility", as advocated by PHMSA and the highly-acclaimed Common Ground Alliance (CGA). The CGA is an organization made up of virtually all damage prevention stakeholders who work on improving all areas of damage prevention. Since its inception in 2000, the CGA has grown in size and influence around the country as the leading national damage prevention organization, effectively partnering with government and private sector entities at the federal, state, and local level. NUCA has been a proud member of the CGA since it was established, representing the "Excavator" stakeholder group on the CGA Board of Directors and on all working committees.

“Prohibitions” in the PIPES Act

According to PHMSA, the intent of the this regulation is to “issue criteria and procedures, through a rulemaking proceeding, for determining whether states are adequately enforcing their damage prevention laws, and for conducting federal enforcements if necessary.” PHMSA has publicly indicated that the agency’s intent is *not* to dictate or control state enforcement practices, but will reserve the authority to enforce damage prevention laws in states deemed to have inadequate enforcement.

The PIPES Act includes “Prohibitions” language that restricts persons from engaging in demolition, excavation, tunneling, or construction “without first using that system to establish the location of underground facilities,” or “in disregard of location information or markings established by a pipeline facility.” The legislation also requires that excavators promptly report any damage to the owner or operator caused by excavation, and to call the “911” emergency number if “the damage results in the escape of any flammable, toxic, or corrosive gas or liquid...”

The “Prohibitions” also address the locating and marking responsibilities of the pipeline operator, stating that “[a]ny owner or operator of a pipeline facility who fails to respond to a location request in order to prevent damage to the pipeline facility or who fails to take reasonable steps, in response to such a request, to ensure accurate marking of the location of the pipeline facility on order to prevent damage to the pipeline facility shall be subject to a civil action under section 60120 or assessment of a civil penalty under section 60122.”

In other words, the PIPES Act requires excavators to call the appropriate one-call center, respect the markings provided by the pipeline operator, report any damage and call 911 in hazardous situations as described above. Comparably, pipeline owners and/or operators must respond to locate requests and provide accurate locating and marking of their facilities in a timely fashion (according to state law). NUCA believes that these primary responsibilities are imperative to achieving damage prevention, and that if either side fails to do its part, safety is compromised.

Federal Enforcement Only if States Neglect Enforcement Responsibilities

The “Limitation” provision in the PIPES Act restricts PHMSA to conduct “an enforcement proceeding... against persons who violate that state’s damage prevention laws, unless (PHMSA) has determined that the state’s enforcement is inadequate to protect safety, consistent with this chapter, and until (PHMSA) issues, through a rulemaking proceeding, the procedures for determining inadequate state enforcement of penalties.”

NUCA believes that the best place for development and enforcement of damage prevention programs is at the state level. The federal government should encourage states to adopt efficient policies, educational activities, and enforcement procedures that promote effective damage prevention programs. For years, PHMSA has demonstrated a strong track record of effectively partnering with state and local governments as well as the private sector to promote quality damage prevention programs. The success of the CGA speaks for itself, and PHMSA played an imperative role in establishing it. Moreover, the agency’s steadfast support of the CGA in testimony before Congress and in communications with other federal and state government entities provide countless examples of PHMSA’s partnership with virtually all damage prevention stakeholders.

NUCA understands that the intent of this proposed rule is to provide for federal enforcement of damage prevention only under dire circumstances where the state entity is either unaware of its enforcement responsibilities or is simply neglecting them. NUCA does not support a permanent federal role in enforcing state damage prevention laws. Additionally, as our comments address, fair and equitable enforcement on *all* parties responsible for protecting underground facilities will be imperative.

Encourage Balanced Enforcement

Parts 192 and 195 of the pipeline safety regulations already requires natural gas and hazardous liquid pipeline operators to locate and mark their facilities in response to locate requests by excavators. For example, §192.614 requires gas pipeline operators to carry out “a written program to prevent damage to that pipeline from excavation activities.” This section requires operators to “learn the location of underground pipelines before excavation activities are begun,” and to “[p]rovide for temporary marking of buried pipelines in the area of excavation activity before, as far as practical, the activity begins.”

While working to help the 2006 pipeline safety reauthorization measure, NUCA spent hours with several staff members of House and Senate committees involved with the legislation. Staff repeatedly made the point that locating and marking requirements were already included in the pipeline safety regulations. Our response to this was consistent and clear: a *balanced* approach to damage prevention is fundamental to its effectiveness – excavators as well as facility operators must meet their responsibilities for successful damage prevention. Therefore, we submit that state authorities who evaluate their damage prevention programs and related enforcement practices in response to the PIPES Act must consider both sides of the damage prevention coin.

Additionally, we hope the NPRM will look at “in house” excavators employed by the pipeline company. While “third party” excavators (working under contract for the owner/operator) seem to be at the center of attention in the ANPRM, incidents involving excavators employed by the facility owner are often left out of the discussion. “First party” and “second party” damages, although often unreported, carry the same consequences as damages caused by landscapers, home owners, and contract excavators. The NPRM should address this so that state authorities can adequately look at the big picture.

NUCA was pleased to see the “Prohibitions” (enforcement) section of the PIPES Act include provisions to address the responsibilities of both excavators and underground pipeline operators. We believe PHMSA should follow the approach in the proposed rule. When evaluating determining the adequacy of a state’s enforcement program, PHMSA should hold enforcement of facility operators’ locating and marking responsibilities in the same regard as the responsibilities of the excavator, and the proposed rule should reflect that.

Encourage Comprehensive Enforcement

To the extent possible, PHMSA should encourage states to evaluate and enhance their enforcement practices for *all* underground facilities. Although federal pipeline safety regulations limit PHMSA’s jurisdiction to natural gas and hazardous liquid pipelines, state authorities responding to this regulatory initiative will certainly consider all underground facilities under their jurisdiction.

The broad and vast network of underground facilities varies in shape, size, depth and material, and it carries a wide range of products and provides many important services. However, the activities and responsibilities needed to protect them from damage during excavation are quite similar. Underground facility operators should belong to the appropriate one-call center, and respond to locate requests by accurately locating and marking its underground facilities in a timely manner. Excavators must call the one-call center, wait the required time for the facilities to be marked, respect the markings, and dig carefully. If any of these primary responsibilities are not met, damage prevention is compromised, regardless of the types of facilities that exist in the work area.

NUCA understands that PHMSA's jurisdiction is limited to gas and hazardous liquid pipelines. However, its influence on how state authorities adjust their programs and enforcement practices to protect all underground facilities will be significant as this regulation moves forward. Addressing enforcement in a balanced and comprehensive manner in the proposed rule will facilitate the entire process.

Role of "Nine Elements" of the PIPES Act

The PIPES Act describes what has become widely known as the "Nine Elements of an effective damage prevention program." The Nine Elements include enhanced communication and partnership, performance measures for locators, effective training and public education, fair and consistent enforcement, efficient use of technology, and data analysis to improve performance. Although the ANPRM solicits feedback on what should constitute adequate and inadequate enforcement, NUCA suggests that PHMSA look at the state damage prevention program as a whole. Even if thorough enforcement exists in a particular state, if the program itself does not adequately address the Nine Elements, we submit that the program itself may be inadequate.

For example, if a state's damage prevention program and enforcement practices were to exclusively focus on excavator responsibilities, that program is not fully addressing damage prevention. A state that does not evaluate "Element 3," which calls for operators to establish performance measures for both "in house" and contract locators, is not adequately looking at all sides of the issue. Unfortunately, NUCA members in many states do not feel that this fundamental element is properly addressed. PHMSA should consider this a high priority in its efforts to improve state damage prevention programs and enforcement.

Conclusion

NUCA continues to serve as an active member of the CGA, and we appreciate the organization's dedication to "shared responsibility" in damage prevention. The CGA's successful efforts in creating the toll-free "811" number is making great progress in facilitating the process of connecting those engaging in excavation with the appropriate one-call center. However, compliance with the requirements of underground facility operators seems to be considered less of a priority in enforcement practices in many states.

The effectiveness of any state damage prevention program is contingent on how each stakeholder meets its responsibility in the process. Effective planning and design, efficient practices by one-call centers, excavator compliance with all damage prevention requirements, accurate and timely locating and marking practices by *all* facility operators, and educated and

prudent oversight and enforcement by all levels of government are needed to fully achieve damage prevention.

Madam Chairman, I appreciate the opportunity to provide this testimony, and I look forward to answering any questions the subcommittee may have.

